

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION**

**WSOU INVESTMENTS, LLC d/b/a
BRAZOS LICENSING AND
DEVELOPMENT,**

Plaintiff,

V.

**DELL TECHNOLOGIES INC., DELL
INC., EMC CORPORATION, and
VMWARE INC.,**

Defendants.

Civil Action No.: 6:20-cv-00480-ADA
Civil Action No.: 6:20-cv-00481-ADA
Civil Action No.: 6:20-cv-00486-ADA

JURY TRIAL DEMANDED

**REPORT AND RECOMMENDATIONS OF
THE UNITED STATES MAGISTRATE JUDGE**

**TO: THE HONORABLE ALAN D ALBRIGHT,
UNITED STATES DISTRICT JUDGE**

This Report and Recommendation is submitted to the Court pursuant to 28 U.S.C. § 636(b)(1)(C), Fed. R. Civ. P. 72(b), and Rules 1(f) and 4(b) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas, Local Rules for the Assignment of Duties to United States Magistrate Judges. Before the Court are the various pretrial motions listed in the table below. The Court heard oral argument on these motions on January 27 and 30, 2023. For the reasoning stated on the record during the hearing, the Court issued the following recommendations, which are memorialized below.

V. OBJECTIONS

The parties may wish to file objections to this Report and Recommendation. Parties filing objections must specifically identify those findings or recommendations to which they object.

The District Court need not consider frivolous, conclusive, or general objections. *See Battle v. U.S. Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987). A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days shall bar that party from de novo review by the District Court of the proposed findings and recommendations in the Report. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v Arn*, 474 U.S. 140, 150–53 (1985); *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (en banc). Except upon grounds of plain error, failing to object shall further bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas*, 474 U.S. at 150–53; *Douglass*, 79 F.3d at 1415.

Dated: January 30, 2023


DEREK T. GILLILAND
UNITED STATES MAGISTRATE JUDGE

THE COURT'S RECOMMENDATIONS

Movant	Motion	Docket No.	RECOMMENDATION
Brazos	Plaintiff's Daubert Motion to Exclude Certain Opinions In The Expert Report of Stephen L. Becker, Ph.D. Or In The Alternative Strike Portions of the Expert Report of Stephen L. Becker, Ph.D.	ECF 254 (-480) ECF 251 (-481) ECF 257 (-486)	DENIED
Brazos	Plaintiff's Motion to Strike Certain Portions of Defendants' Expert Reports and Rule 26(a)(2)(C) Disclosure	ECF 255 (-480) ECF 255 (-481) ECF 258 (-486)	DENIED, but Plaintiff may take depositions of up to 3.5 hours of Colbert and Varghese.
Brazos	Plaintiff's Motion to Exclude Certain Opinions In the Expert Reports of Benjamin F. Goldberg, Ph.D. And Kevin Jeffay, Ph.D. Regarding Invalidity of U.S. Patent No. 9,164,800 And Licensing Opinions of Tajana Rosing, Ph.D. and Kevin Jeffay, Ph.D	ECF 256 (-480) ECF 256 (-481) ECF 259 (-486)\	DENIED
Brazos	Plaintiff's Motion for Partial Summary Judgment For Validity of U.S. Patent No. 9,164,800	ECF 257 (-480) ECF 257 (-481) ECF 260 (-486)	DENIED
Brazos	Plaintiff's Motion for Partial Summary Judgment and Supplemental Motion <i>in Limine</i>	ECF 294 (-480) ECF 295 (-481) ECF 297 (-486)	GRANTED as UNOPPOSED

VMware	<p>Defendants' Motion to Dismiss First Amended Complaint for Failure to State a Claim</p> <p>The Court dismissed Plaintiff's indirect infringement claims, but the Court's decision on Plaintiff's direct infringement claims remains pending. <i>See, e.g.</i>, 12/21/20 Hearing Tr. 76:16–77:7; 4/2/21 E-mail Exchange with WSOU.</p>	<p>ECF 38 (-480) ECF 38 (-481) ECF 38 (-486)</p>	DENIED
VMware	Defendants' Opposed Motion for Intra-District Transfer of Venue to the Austin Division of the Western District of Texas	<p>ECF 43 (-480) ECF 44 (-481) ECF 43 (-486)</p>	DENIED
VMware	Defendants' Opposed Motion to Dismiss for Lack of Subject Matter Jurisdiction Under Federal Rule of Civil Procedure 12(B)(1) (for (a) gap in chain of title ('360 patent); (b) failure of assignment from Wade and Company to Plaintiff ('360 and '133 patents); and (c) no assignment to Plaintiff to sue for past damages ('360, '133, '800 patents))	<p>ECF 196 (-480) ECF 193 (-481) ECF 195 (-486)</p>	DENIED
VMware	Defendants' Motion to Exclude Certain Portions of Mr. Roy Weinstein's Expert Report	<p>ECF 246 (-480) ECF 246 (-481) ECF 249 (-486)</p>	DENIED-IN-PART (as to apportionment opinion, inclusion of non-infringing damages in royalty base, and as to the '133 patent and non-infringing configuration) and GRANTED-IN-PART (as to '800 and '360 inclusion of software only sales. If there are sales of software with hardware, this is DENIED and those can be included.)

VMware	Defendants' Motion to Strike Certain Portions of Mr. Roy Weinstein's Expert Report	ECF 250 (-480) ECF 250 (-481) ECF 253 (-486)	GRANTED
VMware	Defendants' Motion to Exclude Certain Opinions of Stan McClellan, Ph.D.	ECF 248 (-480) ECF 248 (-481) ECF 251 (-486)	DENIED
VMware	Defendants' Motion to Strike Certain Portions of Dr. Stan McClellan's Expert Report Regarding Indirect Infringement* *Plaintiff has filed a notice of non-opposition to this motion. <i>See</i> Case - 480, ECF 291; Case -481, ECF 291; Case -486, ECF 294	ECF 252 (-480) ECF 253 (-481) ECF 255 (-486)	GRANTED as UNOPPOSED
VMware	Defendants' Motion to Strike Certain Opinions of Dr. Stan McClellan Concerning Infringement of U.S. Patent No. 7,539,133	ECF 242 (-480)	DENIED
VMware	Defendants' Motion for Summary Judgment of Non-Infringement of U.S. Patent No. 7,539,133	ECF 244 (-480)	DENIED
VMware	Defendants' Rule 12(c) Motion for Judgment on the Basis of Ineligibility Under 35 U.S.C. § 101 of U.S. Patent No. 9,164,800	ECF 191 (-481)	DENIED

VMware	Defendants' Motion to Strike Previously Undisclosed Theories of Dr. Stan McClellan Concerning the Infringement of U.S. Patent No. 9,164,800	ECF 242 (-481)	DENIED as to Network Aware DRS, GRANTED as to virtual memory and virtual storage, and DENIED as MOOT regarding Pair-Wise Load Balancing
VMware	Defendants' Motion for Summary Judgment of Non-Infringement of U.S. Patent No. 9,164,800	ECF 244 (-481)	GRANTED as to virtual memory and virtual storage and DENIED-IN-PART (as to maximum latency, network DRS, and 273(a))
VMware	Defendants' Rule 12(c) Motion for Judgment on the Basis of Ineligibility Under 35 U.S.C. § 101 of U.S. Patent No. 7,092,360	ECF 172 (-486).	DENIED
VMware	Defendants' <i>Daubert</i> Motion and Motion to Exclude Certain Opinions of Dr. Stan McClellan as to U.S. Patent No. 7,092,360	ECF 245 (-486)	DENIED
VMware	Defendants' Motion for Summary Judgment of Non-Infringement of U.S. Patent No. 7,092,360	ECF 247 (-486)	GRANTED as to "current pointer," "next pointer," and "selector;" and DENIED as to "computer generated model" and "monitor"